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NO. 87-1705

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BERNARD M. BARRETT, JR., M.D., AS PRESIDENT OF PLASTIC AND RECONSTRUCTIVE SURGEONS, P.A.,
Petitioner

v.

UNITED STATES OF AMERICA and MICHAEL O. HANSON, SPECIAL AGENT OF THE INTERNAL REVENUE SERVICE,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Petitioner agrees with the United States that the petition for a writ of certiorari filed herein should be granted and that there is a conflict in the legal rulings of the Fifth and Ninth Circuits with regard to whether a district court may condition enforcement of a summons to protect

section 6103 confidentiality rights. However, petitioner opposes the United States' alternative suggestion in its "Brief For The Respondents," at page 7, footnote 4, that the Court may wish to hold this case (*Barrett*) pending the disposition of *United States v. Zolin,* 809 F.2d 1411 (9th Cir.), reh'g en banc granted, 832 F.2d 127 (9th Cir. 1987), order granting reh'g en banc vacated, 842 F.2d 1135 (9th Cir. 1988), petition for certiorari pending, No. 88-40. There are four basic reasons why the *Barrett* case should be directly heard by this Court and not merely held pending disposition of the *Zolin* case. At the outset of this reply, however, petitioner emphasizes and the United States agrees that there is a clear conflict in the legal rulings between the Ninth and Fifth Circuits in *Barrett* and *Zolin.* The reasons asserted below do not and are not intended to subtract from such conflict, but do demonstrate certain features of the *Barrett* case which do not appear to be present in the *Zolin* case and are features this Court should consider in resolving the conflicting legal rulings of the Ninth and Fifth Circuits. Therefore, for the following reasons the *Barrett* case should be directly heard by this Court and not held pending disposition of the *Zolin* case.

I.

A Jurisdictional Due Process of Law Issue is Present in the *Barrett* Case Which is Not Present in the *Zolin* Case

First, there is a substantial jurisdictional due process of law issue present in the *Barrett* case which does not appear to be present in the *Zolin* case and, as explained in the petition for a writ of certiorari filed herein (pp. 17-20), such jurisdictional due process of law concept pre-

sents a compelling legal reason for resolving the overall question presented in favor of the taxpayer. In *Barrett*, a special agent of the Internal Revenue Service Criminal Investigation Division wishes to utilize the summoned information, i.e., Dr. Barrett's books and records, to obtain the names and addresses of all his patients so that the special agent may continue a mass mailing of letters to 100% of Dr. Barrett's patients, each of which contains the disclosure of the "return information" that Dr. Barrett is under criminal investigation.[1] See 26 U.S.C. § 6103(b)(2)(A) and the dissenting opinion of Fifth Circuit Judge John R. Brown at Pet. App. A-30. Dr. Barrett contends and Judge Brown's dissent makes clear that 26 U.S.C. § 6103(k)(6) does not allow the Internal Revenue Service the power to make such "unnecessary" and massive disclosures. J. Brown, Pet. App. A-36. As Judge Brown's dissent and prior opinions in this case further explain (Pet. App. A-38-39, 67, 70-72), such massive disclosures that a taxpayer is under an administrative criminal investigation is most "damning." Such a mass disclosure to all of a physician's patients is so "damning"

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1. Contrary to the United States' statements in its "Brief For The Respondents" in this case, page 2, and its petition for a writ of certiorari in the *Zolin* case, page 11, the mass circularization previously sent and proposed to be continued by Special Agent Hanson to Dr. Barrett's patients are not "form" letters. In the related civil damage action under 26 U.S.C. § 7431, the Fifth Circuit specifically held that such letters were not "standard I.R.S. letter forms," but were "specially prepared letters that informed each patient that Dr. Barrett was under investigation by the Criminal Investigation Division of the Internal Revenue Service . . ." *Barrett v. U. S.*, 795 F.2d 446, 448 (5th Cir. 1986); Pet. App. A-121. As Judge Brown noted in his dissent in this case, such letters also violated "the instruction in the I.R.S. Manual that 'caution must be exercised not [to] damage the reputation of the taxpayer by making [a mass mailing] either offensive or suggestive of any wrongdoing by the taxpayer'." Pet. App. A-38.

that it constitutes a destruction or taking by the government of all or part of the goodwill of his medical practice, i.e., a "property interest," and substantially interferes with the physician's right to practice his chosen profession, i.e., a "liberty interest." *Greene v. McElroy,* 360 U.S. 474, 492, 79 S. Ct. 1400, 1411 (1959). The government's position in the *Barrett* case that the Internal Revenue Service may undertake to so destroy a professional citizen of this country, that the citizen is relegated to the post-deprivation remedies of an action for damages under section 7431 and the criminal prosecution of the Internal Revenue Service special agent under section 7213 (*Zolin* pet. at 17), and that federal district courts have no jurisdictional authority to prevent, in advance, such harm and violations of law by the Internal Revenue Service ignores the due process of law clause of the fifth amendment to the U. S. Constitution. *Greene v. McElroy,* 360 U.S. at 492. Such position also ignores the "adequate remedy at law" and "complete protection" this Court in *Reisman v. Caplin,* 375 U.S. 440, 84 S. Ct. 508 (1964), held was available to taxpayers in summons enforcement proceedings initiated by the government and ignores that *Reisman,* therefore, constitutes jurisdictional authority for a district court to provide due process of law protection for a taxpayer's statutory confidentiality rights (section 6103) and constitutional right to privacy. To contend a district court does not have the jurisdiction to provide such due process of law protection of a taxpayer's section 6103 rights and constitutional right to privacy as are involved in the *Barrett* case also ignores this Court's emphasis in *United States v. Powell,* 379 U.S. 48, 85 S. Ct. 248 (1964), that federal district courts have the power and obligation to prevent an abuse of their process with regard to an Internal Revenue Service summons.

Petitioner specifically asserted in the district court below the *Reisman* and *Powell* cases as the jurisdictional authority for the district court to provide protection of petitioner's section 6103 rights and constitutional right to privacy and, thereby, the due process of law protection of such type of rights essential to the holdings of *Reisman* and *Powell*. (1-R. 110-111, 115-119, 57-59, 48-56, 10-12). Therefore, because the jurisdictional issue involved in the *Barrett* case includes within it the due process of law issue explained above and in the petition for writ of certiorari filed herein, which does not appear to be present in the *Zolin case*, the *Barrett* case certainly should be directly heard by this Court and not held pending disposition of the *Zolin* case.

II.

The "Return Information" Sought To Be Disclosed In *Barrett* Differs From The "Return Information" Involved In *Zolin*

The *Barrett* case also differs from the *Zolin* case in that in *Barrett* the proposed government conduct is not the disclosure of the summoned information, as is the situation in the *Zolin* case. In *Barrett*, the proposed government conduct is the utilization of the summons and the process of the district court to obtain the names and addresses of all of Dr. Barrett's patients from his books and records so that a mass mailing of letters to all of his patients may take place, each of which contains the unnecessary disclosure of "return information" that he is under a criminal investigation. While there is certainly a conflict in the legal rulings of the Fifth and Ninth Circuits in *Barrett* and *Zolin*, the above described feature of the *Barrett* case is not present in the *Zolin* case and

should be directly considered by this Court in resolving such conflict.

III.

The Fifth Circuit's Majority Opinion Misapplies This Court's Decision in *United States v. Arthur Young & Co.*, Which Error is Not Expressed in the *Zolin* Opinion

The opinion of the Ninth Circuit in *Zolin* does not contain the erroneous majority ruling in the *Barrett* case that section 6103 and its related confidentiality provisions, sections 7213 and 7431, do not constitute "unambiguous directions from Congress" as required by *United States v. Arthur Young & Co.*, 465 U.S. 805, 816, 104 S. Ct. 1495, 1502 (1984) and the other prior decisions of this Court discussed therein. The petition for a writ of certiorari filed herein (pp. 20-24) describes such misapplication by the Fifth Circuit of this Court's ruling in *Arthur Young & Co.*, as also recognized by Judge Brown (Pet. App. A-40, 54), and such misapplication should be specifically addressed by this Court in resolving the overall question presented. The decisions of this Court in *Arthur Young & Co.*, *United States v. Bisceglia*, 420 U.S. 141, 150, 95 S. Ct. 915, 921 (1975), *United States v. Euge*, 444 U.S. 707, 715, 100 S. Ct. 874, 880 (1980), and *Donaldson v. United States*, 400 U.S. 517, 535, 91 S. Ct. 534, 544 (1971), do not hold that "unambiguous directions from Congress" can consist only of procedural statutes describing what substantive statutory and constitutional rights may be protected by a district court in an Internal Revenue Service summons enforcement proceeding. All of those cases in-

volved this Court's search for whether an "unambiguous," substantive statutory or constitutional right was being adversely impacted by the Internal Revenue Service summons. Congress' enactment of a "stringent code of confidentiality," to use the words of Judge Brown, constitutes such an "unambiguous direction from Congress" and this Court should correct the Fifth Circuit's error on this point by directly hearing the *Barrett* case. This Court's decision in *Church of Scientology v. I.R.S.*, ____U.S.____, 108 S. Ct. 271 (1987), would certainly appear to construe section 6103 as such an "unambiguous direction from Congress," which is inconsistent with the Fifth Circuit's ruling on this point.

IV.

The Vigorous Dissent of the Split En Banc Decision by The Fifth Circuit in *Barrett* Deserves This Court's Direct Attention

To hold the *Barrett* case pending disposition of the *Zolin* case would not give due attention to the vigorous, studied, and extensively researched dissent led by Fifth Circuit Judge John R. Brown. The *Barrett* case should be decided on its own merits and not by the facts of another case. Judge Brown's dissent thoroughly traces the legislative history of the confidentiality statutes, including Congress' awareness of "the complaints of literally millions of taxpayers concerning abuses in the administration of the I.R.C." and applies the law to the particular facts of Dr. Barrett's case. Pet. App. A-31 (Footnote omitted.) In Judge Brown's application of the law to the facts of the *Barrett case,* it is apparent that the government conduct complained of is most capable of recurring and, therefore, represents an issue of national

importance. Pet. App. A-39. Therefore, the *Barrett* case also should be directly heard by this Court and not held pending disposition of the *Zolin* case because of the work of the dissent and its recognition that the *Barrett* case represents a case of national importance that effects the rights of all taxpayers, i.e., "Congress, in furtherance of its goal of strengthening the rights of taxpayers, intended that taxpayers should not be exposed to such damning, untried, unproved accusations." J. Brown, Pet. App. A-39.

V.

Conclusion

For the above reasons, petitioner contends the *Barrett* case should be directly heard by this Court in its resolution of the conflicting legal rulings between the Fifth and Ninth Circuits.[2]

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2. The United States' "Brief for the Respondents" erroneously states at page 2 that:

> When an audit of petitioner's personal and corporate income tax returns revealed a $100,000 discrepancy between the amounts deposited into petitioner's bank accounts and the amounts of gross income shown on his tax returns, the Internal Revenue Service (IRS) transferred the case to its criminal division.

A reading of the government's purported supporting citation for such statement, "Pet. App. A-5," however, reveals that the Fifth Circuit's language cited actually states something quite different:

> When the initial investigation uncovered a $100,000 discrepancy between Barrett's books and his bank records, the IRS transferred the case from its civil to its criminal division.

The government has never convinced a court nor a grand jury that Dr. Barrett understated his income, and Dr. Barrett contends one of the reasons why is that the alleged informant was an ex-employee who had an economic interest in damaging Dr. Barrett's medical practice and the alleged informant's information was simply not true. *Barrett v. U. S.*, 795 F.2d 446, 451 (5th Cir. 1986), Pet. App. A-129-130, 1-R8, document pp. 24-25. The relevancy

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of this point for purposes of this reply memorandum is that the *Barrett* case represents a situation Congress clearly wanted to make illegal in sections 6103, 7213, and 7431, i.e., the use of the IRS and its confidential "return information" by private citizens to gain an advantage over their fellow citizens. (1-R8, document pp. 24-25). Again, the *Zolin* case does not have this particular aspect, which is a feature most capable of recurring on a large scale, and the *Barrett* case should not, therefore, be held pending disposition of the *Zolin* case.